IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 1950 of 2001

Date of decision : 25th September, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 25.09.2007

Initials of Judge

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 1950 of 2001
(Old No. 1331 of 1989)

1. Akbar S/o Sri Majeed
2. Israil S/o Sri Gafoor
   Both residents of Village Nagra
   P.S. Laksar
   District Haridwar
3. Abdul S/o Hasmat
4. Iqbal S/o Magta
   Residents of Village Mustafabad
   P.S. Jwalapur
   District Haridwar ...Appellants

Versus

State of U.P. ... Respondent

Mr. Navneet Kaushik, Advocate for the appellants
Mr. G.S. Sandhu, learned Government Advocate with Mr. B.S. Parihar, Brief Holder for the respondent/State

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (for brevity as Cr.P.C.), is directed against the judgment and order dated 26.05.1989, passed by learned Additional Sessions Judge, Roorkee in Sessions Trial No. 515 of 1988, whereby the appellants have been convicted & sentenced to undergo three years R.I. u/s 148 Indian Panel Code, 1860 (for brevity as I.P.C.) and imprisonment for life u/s 302 read with 149 I.P.C. It was further directed that both the sentences shall run concurrently.

2. Brief facts of the case are that complainant Hanif PW1 lodged an F.I.R. (Ex.Ka.1) in the Police Station Jwalapur, Haridwar on 14.09.1987 alleging therein that on 14.09.1987 at about 10:30 a.m. he was going from his village Ratanpur

to Roorkee alongwith his son Furkar. Idrish PW2 and Ahmed Ali of his village also accompanied them. When they were passing through the path near the field of Mehmood at about 11:00 a.m., accused/appellants emerged from the field of Mehmood and surrounded them. Accused/appellants Akbar, Israil, Abdul and Iqbal were holding country made pistols in their hands whereas accused Mehboob and Mumtyaz were holding spears in their hands. Accused/appellant Iqbal told Furkan that few days before he had fired upon him and he was escaped but today he would not spare him and would like to kill him. The accused/appellant Abdul fired upon Furkan which hit on his right shoulder due to which Furkan fell on the ground; accused/appellant Akbar fired on his back and accused/appellant Iqbal fired upon his neck. Complainant Hanif PW1 and his associates wanted to save Furkan but the accused/appellants pushed them so that they could not save him. Thereafter, they fled away from the spot. The complainant made hue and cry due to which nearby people came at the spot and saw accused/appellants fleeing away from the spot. Furkan succumbed to his injuries at the spot. Thereafter, complainant Hanif PW1 got the report scribed from Master Liyakat Ali and lodged in the police station against the accused/appellants. On the basis of the report a chick report (Ex.Ka.4) was prepared; necessary entry was made in the General Diary vide Ex.Ka.5 and case was registered against the accused persons. The case was investigated by S.I. Yashwant Singh who recorded the statement of complainant Hanif PW1 & other persons; prepared panchayatnama; visited the place of occurrence; took sample of blood stained soil and plain soil. Thereafter the investigation was entrusted to S.I. M.K. Mishra. After

completing the investigation, he submitted the chargesheet (Ex.Ka.14) before the court.

3. After submission of the chargesheet, the accused/appellants were committed to the Court of Sessions for trial and the trial court framed charges u/s 148 and 302/149 I.P.C. against the accused/appellants. The accused/appellants denied the charges and claimed to be tried.

4. The prosecution in support of its case examined as many as seven witnesses. Hanif PW1 is informant and eyewitness of the incident. He is the father of deceased Furkan. Idrish PW2 is other eyewitness of the incident. He is nephew of Hanif PW1. He was going with the deceased and complainant at the time of incident. Master Liyakat Ali PW3 is the scribe of the report. He has written the report on the dictation of informant Hanif PW1. Dr. Chandra Prakash PW4 is the medical officer who had conducted the post mortem of deceased Furkan. Constable Pramod Kumar Sharma PW5 and Head Constable Gajraj Singh are the formal witnesses of the prosecution case. S.I. Yashwant Singh PW8 is the Investigating Officer who investigated the case and later on the investigation was entrusted to S.I. M.K. Mishra who submitted chargesheet Ex.Ka.14.

5. The accused/appellants were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. Accused Akbar has further stated in his statement recorded u/s 313 Cr.P.C. that Hasmat, the father of accused Abdul belonged to Mustafabad and Akhtar is the nephew of Hasmat. The accused Akbar has stated that Akhtar was married with his

sister and he used to go to the house of his sister. Due to village rivalries, he has falsely been implicated in the case. Accused Abdul has stated in his statement recorded u/s 313 that the prosecution witnesses are the relatives of Rashid Pradhan. In the year 1986, 8 villagers alongwith four police personnel unlawfully entered into the house of his brother Riyaz and a melee took place between them in which he alongwith other villagers assaulted the police personnel. Cross cases were registered against each other and a case u/s 307 was lodged against him in which he was acquitted. However, Rashid Pradhan and four police personnel were facing trial before the court. He was the pairokar of his brother Riyaz in those cases, as such, he was falsely implicated in this case. He has further stated in his statement recorded u/s 313 Cr.P.C. that daughter of Hanif PW1 as well as Rashid Pradhan were married in Kaliyar. Hanif was married in Kasampur and the daughter of brother-in-law of Hanif PW1 living in Kasampur was married with the son of Rashid Pradhan. Accused Iqbal has stated in his statement recorded u/s 313 Cr.P.C. that on the date of incident he went to Mukurpur village as the wife of his brother-in-law Wahid had expired. Accused Israil has stated in his statement recorded u/s 313 that he is a poor man and he has falsely been implicated in the matter.

6. The accused/appellants did not adduce any oral evidence in their defence but filed certain documentary evidence , Ex. Kha.1 to Kha.7 in support of their defence. Ex.Kha.1 shows that Riyaz, brother of accused Abdul filed a case against Rashid Pradhan and four police personnel in the court of Munsif Magistrate, Haridwar. Ex.Kha.2 shows that the accused Akbar and Mumtaz have been tried for the

commission of murder of one Yasin, however, they were acquitted from the charge. Ex.Kha.3 shows that Hasmat, the father of accused Abdul filed a case against Rashid Pradhan in the court of Judicial Magistrate, Roorkee u/s 418, 468, 471, 421 I.P.C. Ex.Kha.4 shows that a trial proceeded against accused Iqbal and Majeed for attempting to commit murder of Mansab S/o Hasmat in which they were convicted and sentenced to undergo R.I. for five years u/s 307 I.P.C. and R.I. for two years u/s 148 I.P.C. Ex.Kha.5 shows that Police Station Jwalapur has submitted a report to VIth Additional Sessions Judge, Saharanpur in S.T. No. 545/85 reporting therein that Furkan (deceased) was involved in Case Crime No. 443/84 u/s 460 I.P.C. and Case Crime No. 547/87 u/s 379 & 411 I.P.C. Thus, Ex.Kha.5 shows the criminal history of Furkan (deceased). Ex.Kha.6 is the copy of identification parade of the accused Furkan (deceased) in ST No. 545/85, State Vs. Kuldeep and others pending before IVth Additional Sessions Judge, Saharanpur. Ex.Kha.7 is the copy of judgment passed by which the IInd Additional Sessions Judge, Saharanpur convicted the accused Furkan (deceased) in ST No. 601 / 85 u/s 307/34 I.P.C. for attempting to commit the murder of accused Iqbal.

7. The learned Sessions Judge on appreciation of the evidence held accused/appellants guilty to the offences charged against them and convicted & sentenced them as mentioned above.

8. We have heard learned counsel for the parties and perused the record.

9. At the outset, it needs to be mentioned here that it is not disputed that deceased Furkan died on account of firearm injuries sustained by him on the date of occurrence. Dr. Chandra Prakash PW4, Autopsy Surgeon conducted the postmortem of deceased Furkan on 15.09.1987 at about 1:00 p.m. and found the following ante mortem injuries on the person of deceased:-

1. Abrasion 1 cm. x ½ cm. on forehead 1 cm. above left eyebrow.
2. Abrasion 3 cm. x. 1 cm. below left lower lid.
3. Firearm wound of entry 3 cm. x 2 cm. x bone deep on right side of neck, 3 cm below the ear (Rt) directing downward, backward & medially, margins inverted, blackening present. On sectioning of the wound three pieces of wad with 4 pellets (four pellets) found & sealed. Muscles of Rt side neck, right carotid artery, trachea, oeso-phagus, and 3rd cervical vertebra were lacerated and fractured respectively.
4. Contusion 20 cm. x 18 cm. on right side chest & upper abdomen.
5. F.W. of entry 1 cm. x 1 cm. on the right side back upper part, 8 cm. lateral to mid line of body margins inverted, blackening present, directing forward, upward and laterally.
6. F.W. of exit of injury No. 5, size 1-1/2 x 1-1/2 cm. on right side neck 4 cm. above the right tip of shoulder margins averted, on sectioning the corresponding muscles were found lacerated.
7. Six firearm wound of entry in an area of 9 cm. x 6 cm. on right side back lower part, 13 cm above right iliac crest. Each F.W. measuring 0.75 cm. x 0.75cm. x cavity deep, margins inverted, blackening present, directing forward, upward and medially. On opening the abdomen, right lobe of liver, right kidney lacerated and three (3) pellets were found and sealed.

In the opinion of Medical Officer, the death of the deceased was caused due to shock and haemorrhage as a result of ante mortem injuries. He has proved the post mortem report Ex. Ka.3. He has opined that injury Nos. 3, 5, 6 & 7 could be

caused by fire arms whereas injury Nos. 1, 2 & 4 could be sustained by the deceased due to fall. He has further opined that the death of the deceased could have been occurred at about 11 a.m. on 14.09.1987. Thus, it is amply proved that the deceased died on account of injuries sustained by him on the date of occurrence.

10. Now, we have to consider who is responsible for the injuries caused on the person of the deceased Furkan. The case rests on the direct evidence. The prosecution in support of its case examined Hanif PW1 and Idrish PW2. Hanif PW1 is the informant, father of deceased and eyewitness of the incident. He has stated in his evidence that on the date of incident, he was going to Roorkee alongwith his son Furkan, Idrish PW2 and Ahmed Ali to make some purchasings. When they reached near the field of Mehmood, which was about ½ furlong from his village, accused/appellants emerged from the field of Mehmood and surrounded them. Accused/appellants Akbar, Isrial, Abdul and Iqbal were holding country made pistols in their hands whereas accused Mehmood and Mjmtyaz were holding spears in their hands. Accused/appellant Iqbal told Furkan that few days before he had fired upon him and he made his escape good on that day but he would not spare him today. The accused/appellant Abdul fired upon Furkan which hit on his right shoulder due to which Furkan fell on the ground; thereafter accused/appellant Akbar fired on his back and accused/appellant Iqbal fired upon his neck. Complainant Hanif PW1 and his associates cried and wanted to save Furkan but the accused/appellants threatened them to kill and told them to remain silent. After commission of offence, the accused/appellants fled away from the place of occurrence. Furkan succumbed to his

injuries at the spot. Hanif PW1 has also stated that he has enmity with Iqbal and for that reason a criminal case was instituted in which his son Furkan was sentenced to five years imprisonment. Idrish PW2 also narrated entire incident in his evidence. He is the nephew of the complainant Hanif PW1. He was also going to Rorkee from his village with the deceased Furkan and Hanif PW1. he has corroborated the evidence of Hanif PW1 on all material particulars.

11. We have gone through the entire evidence of prosecution eyewitnesses, Hanif PW1 and Idrish PW2. Both the witnesses have corroborated each other. We have gone through the entire evidence and noticed that there were some marginal variations in the testimony given in the Court. Such variations cannot be duped as improvement made with any sinister motive. The said marginal variations are of no use to the defence. The learned counsel for the accused/appellants further could not demonstrate us any material contradictions or variations which could lead us to take the evidence of eyewitnesses as unreliable. The defence counsel has cross examined both the eyewitnesses at length but nothing could be elicited in their cross examination to discredit their evidence. Their evidence is consistent and believable. While appreciating the evidence of Hanif PW1, father of deceased and Idrish PW2, cousin of the deceased, we cannot lose sight of the panic suffered by the father and cousin of the deceased at the time of the incident. Even then both these witnesses have come forward with the vivid account of the incident as to how the shots were fired by the accused/appellants. Their presence at the spot cannot be doubted. We are satisfied that the witnesses have basically remained at the same position which they have stated in their

statement recorded u/s 161 Cr.P.C. It was further contended that informant Hanif PW1 is the father of deceased Furkan and Idrish PW2 is the nephew of informant. Learned counsel for the accused/appellants contended that the Court's below did not take notice of the fact that there was animosity in between the parties and, therefore, the evidence of so called eyewitnesses was tainted. It is true that Hanif PW1 is the father of deceased Furkan and Idrish PW2 is the nephew of Hanif PW1. It is now well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased or the witnesses, if the witnesses are otherwise found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty can escape nor the innocent is wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and truthful it can be acted upon. If it is found to be improbable or suspicious it ought to be rejected. Animosity is a double edge weapon. Sometimes it can be used for implicating the accused and sometimes it is used as an attack on the deceased or the injured. Thus, animosity cannot be regarded as a weapon only for false implication of the accused. In the instant case, nothing has been elicited in the cross examination of Hanif PW1 and Idrish PW2 to discredit their evidence and their evidence stands corroborated from the medical evidence of Dr. Chandra Prakash PW4. Thus, the evidence of Hanif Singh PW1 and Idrish PW2 could not be rejected on the ground that they are closely related to the deceased. The **Apex Court in the case of State of Punjab Vs. Karnail Singh** reported in **2004 SCC (Cri) p/135** has held as under :-

"8. We may also observe that the ground that the witnesses being close relatives and consequently, being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh v. State of Punjab reported in AIR 1953 Sc 364 in which surprise was expressed over the impression which prevailed in the minds of the Members of the bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., it was observed: (AIR p. 366, para 25)

> *"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – Rameshwar v. State of Rajasthan reported in AIR 1952 SC 54 (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."*

9. Again in Masalti v. State of U.P. AIR 1965 Sc 202 this Court observed: (AIR pp. 209-10, para 14)

> *"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."*

12. Apart from this, it is a matter of common experience that in the recent times the witnesses other than the relations

are not inclined to depose against the accused or they remain indifferent to give their evidence on the ground that they have no courage to come forward to depose against the accused persons. It has now almost become a fashion that the public is reluctant to depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to unnecessary lengthy cross-examination. So, the witnesses avoid coming to the court. Only the related witnesses dare to come before the Court to depose against the accused persons.

13. On a conspectus of various relevant features of this case including the genesis; the nature of the incident; the nature of weapon carried by the accused/appellants at the time of occurrence, it cannot be concluded from the prosecution evidence or from any probability arising from the record that the accused/appellants had falsely been implicated in this case. After going through the same, we do not find any reason to disbelieve the version of the prosecution witnesses. We are completely in agreement with the findings recorded by the trial court and we find that the prosecution has been able to establish the case beyond reasonable doubt. Thus, we do not find any force in the contention of the learned counsel for the accused/appellants.

14. The learned counsel for the accused/appellants contended that even if the evidence of the prosecution was found credible and cogent, the accused/appellants are entitled to get the benefit of doubt as the prosecution has failed to prove any motive to cause injuries on the person of

the deceased. Learned G.A. refuted the contention. The defence has failed document Ex.Kha 1 to Kha-7 which reveal that there was enmity in between the parties. The enmity is a doubt-edged weapon. It can be used for the false implication of the accused or it may be a cause of assault on the deceased. The motive which has been assigned by the prosecution is that there was enmity in between the parties so the accused/appellants had committed murder of Furkan. It was submitted that Furkan had already been convicted by Sessions Court, as such, there was no occasion for the accused/appellants to commit murderous assaults on him. It is true that deceased Furkan had been convicted by the learned Sessions Judge in the said case but it cannot be said that merely by convicting the deceased for 5 years by the Sessions Court, the accused/appellant Abdul was satisfied with the sentence awarded to him. Human behaviour varies from person to person. It also depends upon the mental and social status of persons. It cannot be determined by a particular principle and formula. It is also apparent that there was motive to commit the offence. Thus, the prosecution has proved the motive for committing the crime by the accused/appellants.

15. Assuming for the sake of argument that the prosecution has failed to prove the sufficient motive against the accused/appellants. When the eyewitnesses of the occurrence consistently supported the prosecution case, the question of motive would have lost its importance. It is well settled that in order to bring home the guilt of an accused, it is not necessary for the prosecution to prove the motive. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the

prosecution. If the evidence of the witnesses appears to be truthful and convicting, failure to prove the motive is not fatal to the case of the prosecution. It is also well settled that establishment of motive is not *sine qua non for* proving the prosecution case. In the case of **Baboolal Vs. State of U.P. 2001 SCC (Cri) 1484**, the deceased was sitting inside the teashop of one Abdul Nabi. On the opposite side of road, there was a sweetmeat shop and all the accused were sitting inside it. As the radio was being played on a high pitch, an exchange of words took place between those who were sitting in the teashop and the accused. The accused threatened PW1 and others for raising this petty issue. A little later the deceased reached there and on coming to know of the development of the incident, he expressed his resentment at the incident on such a petty issue. On this, the accused moved forward with a pistol accompanied by the second accused and another person with daggers in their hands and fired upon the deceased. The Hon'ble Supreme Court has held as follows :-

> *"8. Learned counsel rightly contended that on such a petty quarrel, no sensible person would have used such a lethal weapon and killed the victim. How the mind of an assailant reacted is not possible to be fathomed from a detached reflexion. As pointed out by this Court* ***in Nathuni Yadav v. State of Bihar 1998 SCC(Cri) 992:***
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> > *"Many a murders have been committed without any known or prominent motive. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant."*

16. In the case of **Thaman Kumar Vs. State of Union Territory of Chandigarh 2003 SCC (Cri) 1362,** the Hon'ble Apex Court has held that :-

> *"18. Shri Sushil Kumar has drawn our attention to certain findings recorded by the learned Sessions Judge and has urged that he had rightly given benefit of doubt to the appellants and the High Court committed manifest error of law in reversing the aforesaid findings and convicting and sentencing the appellants while hearing an appeal against acquittal. The learned counsel has urged that the prosecution has failed to prove any motive on the part of the appellants to commit the crime. It is true that the only witness examined on the point of motive, namely, PW 7 Sardara Singh, who is the brother of the deceased, turned hostile and did not support the prosecution case. In his statement under Section 161 CrPC he had said that the deceased used to get commission for bringing customers to the guest house and he owed about Rs 42,000 in that account and some dispute had taken place with the owner when he had demanded his money. However, in his statement in Court he denied to have given any such statement. There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. In State of* ***H.P. v. Jeet Singh 1999 SCC (Cri) 539*** *it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it, as it is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended. In* ***Nathuni Yadav v. State of Bihar 1998 SCC (Cri) 992*** *it was held that motive for doing a criminal act is generally a difficult area for prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause need not necessarily be proportionately grave to do grave crimes. It was further held that many a murder have been committed without*

any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable. In our opinion, in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused."

17. It was held by the Hon'ble Apex Court in **Yunus Vs. State of M.P. 2003 (1) SCC 425**:-

"The prosecution in the present case has failed to prove the motive. Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is also well settled law that establishment of motive is not sine quo non for proving the prosecution case."

18. The Hon'ble Apex Court has affirmed the above view in its latest decision in the case of **Bhimapa Chandappa Hosamani Vs. State of Karnataka 2007 (1) SCC(Cri) 456).** The Hon'ble Apex Court has held in **Ramkrushna Vs. State of Maharashtra 2007 AIR SCW 3134** that:-

"18. The High Court might not have dealt with the question of motive elaborately but when the presence of the appellant with Balram has been established, motive takes a back seat. Appellant must have come to the place of occurrence. He came with a knife. The knife injuries were found. Even if the prosecution has not been able to establish as to the exact role played by each of the accused, the fact that both the accused had common intention to commit the crime stood established. Submissions of the learned counsel for the State in this behalf are of some significance. The learned Trial Judge as also the Trial Court cannot be said to have committed any error in relying upon the testimony of the P.W.3 in part. It is in our opinion permissible in law. (See ***Soma Bhai Vs. State of Gujarat AIR 1975 SC 1453)"***

Therefore, we do not find any force in the contention raised by learned counsel for the accused/appellants.

19. Learned counsel for the accused/appellants contended that accused Iqbal had no common cause to associate with the accused/appellants because he was convicted in a case in which he had made a murderous assault on Mansab s/o Hasmat, brother of appellant Abdul. It was further contended that accused/appellants Abdul and Iqbal had enmity, as such, they could not join hands for the commission of the alleged offence. It was further contended that the deceased Furkan was a history sheeter. Learned G.A. refuted the contention and supported the judgment of the learned trial court. As the defence pointed out that there was no common cause of accused Iqbal to join hands with the accused/appellants as there was enmity in between the father of accused Abdul & accused Iqbal and they have filed copy of the judgment Ex.Kha.-4 in support of their contention. It is true that a criminal case was instituted and decided on 27.08.1982 and incident in said trial pertains to 13.03.1980. It is apparent that seven years had elapsed on 14.09.1987, the date of the occurrence to the incident, which occurred on 13.03.1980. There is no evidence or effective cross examination on the point that the accused/appellants had still bitter relations with accused Iqbal. Learned trial court was justified in holding that the document Ex.Kha.4 did not disclose that the relation between accused/appellants Iqbal and Abdul are still strained. It is not in the evidence or in the cross examination that there were still any strain relation between accused Abdul and Iqbal. It cannot be concluded that the incident which took place in the year 1980 would always lead strained relations even after passage of seven years in between the

parties. The evidence of Hanif PW1 and Idrish PW2 categorically states that all the accused persons were present at the spot and they emerged from the field to Mehmood and surrounded them including deceased Furkan. All of them were holding the country made pistols in their hands at the time of commission of offence. Accused/appellants Abdul, Akbar and Iqbal fired upon the deceased whereas Israil, Mehboob and Mumtyaz surrounded Hanif PW1 and Idrish PW2 to see that they could not intervene in the melee to save the deceased. We have no reason to disbelieve the testimony of Hanif PW1 and Idrish PW2. Similarly, Hanif PW1 being the father and Idrish PW2 being cousin, it would be their endeavour to see that the real culprits are punished and they would not implicate wrong persons in the crime, so as to allow the real culprit to escape unpunished. Thus, the evidence of Hanif PW1 and Idrish PW2 is cogent and merely the fact that there was enmity long back in between accused Abdul and Iqbal, would not be a ground to exclude the credible, cogent and convincing evidence of the witnesses. Thus, we do not find any force in the contention raised by the learned counsel for the accused/appellants.

20. It was further contended that the Investigating Officer Yashwant Singh PW7 recorded the statement of Idrish PW2 u/s 161 Cr.P.C. after a lapse of 35 days and the prosecution has not given any specific explanation for such delay in recording the statement of Idrish PW2 u/s 161. The learned G.A. refuted the contention. We do not find any fault in the approach of the learned trial court discarding the above contention of the accused/appellant at the trial stage. It is pertinent to mention here that all the eyewitnesses including Idrish PW2 have been named in the FIR. Thus, the FIR

contains all the names of eyewitnesses who have been produced before the trial court. It is pertinent to mention here that there is a prompt FIR of the incident by Hanif PW1 who lodged the report at 01:05 p.m. at the police station. The prompt FIR thus inspires confidence that it was not the outcome of any consultation or deliberation. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them as also the names of the eye witnesses, if any. It is pertinent to mention here that no question was put to I.O. Yashwant Singh PW7 with regard to the cause of delayed examination under section 161 Cr.P.C. It cannot be held that Idrish PW2 is a got up witness. It is true that there is delay in recording the statement of Idrish PW2 under section 161 Cr.P.C. by the I.O. and the defence has not asked I.O. as to why there was delay in the examination of witnesses. As such, the accused/appellants cannot get any benefit therefrom. It is also pertinent to mention that the F.I.R. was lodged with promptitude in which name of Idrish PW2 was mentioned as eyewitness of the incident. It cannot be concluded that he is a got-up witness. We, therefore, hold that the delay in recording the statement of the witnesses is not fatal to the prosecution case. The Hon'ble Apex Court has held in **Ramesh Vs. State of M.P. 2000 SCC (Cri) 206** that:-

> *"6. Mr. Naik then placed before us the evidence of the three eyewitnesses and contended that their evidence does not inspire confidence and should be rejected. Normally, this Court, sitting in appeal against*

the conviction passed by the Sessions Judge and upheld in appeal, does not reappreciate the evidence of the witnesses again. But the evidence having been placed before us and having been argued at length by the learned Senior counsel, we have scrutinised the same. Nothing substantial has been brought to our notice in the cross-examination of these witnesses for which this Court would come to the conclusion that the witnesses are not believable. As stated earlier, PW 1 was accompanying the deceased right from the beginning when the deceased had gone to supply milk and was proceeding to offer "puja" and PWs 2 and 4 are independent witnesses who happened to be at the scene of occurrence and have narrated the occurrence vividly. The argument of Mr Naik, appearing for the appellant against acceptability of Witnesses 2 and 4 is that they were examined by the police under Section 161 CrPC on 6-10-1985 and 4-10-1985 respectively. This delay in examining the two witnesses ipso facto cannot be a ground to discard their testimony, more so, when in the cross-examination of the witnesses, nothing tangible had been brought out to impeach their testimony. On the other hand, the evidence of PWs 2 and 4 fully corroborates the reliable evidence of PW 1 and therefore, the courts below were justified in maintaining the conviction of appellant Ramesh of the charge under Section 302 IPC. In course of arguments, Mr Naik, learned Senior Counsel also raised a contention that the prosecution has not examined the independent witnesses though available and that an adverse inference should be drawn. But on going through the evidence on record, we do not find any material from which it can be said that the other independent witnesses were available and the same were not examined. That apart, PWs 2 and 4 are independent witnesses and, therefore, it is not necessary for the prosecution to multiply the witnesses. We, therefore, do not find any substance in the aforesaid submission of Mr Bhimrao Naik.

21. The Hon'ble Supreme Court has held in **Ambika Prasad & another Vs. State (Delhi Administration) 2000(2) SCC 646** that:-

"13. The learned counsel for the accused further raised the contention that there was delay in recording the statements of the injured witnesses, therefore, their

evidence should not be accepted which also requires to be rejected. In ***Krishna Pal (Dr) v. State of U.P. 1996 SCC (Cri) 249*** *this Court rejected a similar contention of non-explanation by the prosecution as to why eyewitnesses had not been examined shortly after the incident and for inordinate delay in examining them, by holding that it would not be a ground to discard the convincing and reliable evidence adduced in the case. This contention is also considered by both the courts and has rightly not been accepted."*

22. In the case of **State of U.P. Vs. Satish 2005 SCC (Cri) 642,** the Hon'ble Supreme Court has held as follows:-

"18. As regards delayed examination of certain witnesses, this Court in several decisions had held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version become suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion.

20. It is to be noted that the explanation when offered by the IO on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any affect on the credibility of the prosecution's evidence tendered by the other witnesses."

23. We have gone through the entire evidence. It appears that the Investigating Officer had not been diligent enough to record the statement of Idrish PW2 u/s 161 Cr.P.C. It is also pertinent to mention here that the Investigating Officer had recorded the statement of Hanif PW1 u/s 161 Cr.P.C. on the date of incident. If the Investigating Officer had not been

diligent enough but for that reason was feel that reliable and clinching evidences adduced in this case by the eyewitnesses should not be discarded. This is the remissness on the part of the Investigating Officer which does not help the appellants. The Apex Court has, while maintaining the conviction of the accused in **Karnel Singh Vs. State of M.P. reported in 1995(5) SCC 518, 1995 SCC (Cri) 977 & 1995 CRL.J 4173,** observed:-

> *"Notwithstanding our unhappiness regarding the nature of investigation, have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In case of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the Chaddi. That is the reason why we have said the investigation was slipshod and defective."*

24. The Hon'ble Apex Court has held in **Dr. Krishna Pal (supra)** that:-

> *"9. …….. The Investigating Officer in his deposition has also admitted that through mistake he omitted to mention the crime number in the inquest report. It appears to us that the Investigating Officer had not been diligent enough but for that reason we do not feel that reliable and clinching evidences adduced in this case by the eyewitnesses particularly by Dr Rajveer Singh should be discarded. In this connection, we may refer to a recent decision of this Court* ***in Karnel Sing v. State of M.P.1995 SCC (Cri) 977.*** *In the said decision, it has been indicated by this Court that in a case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established conclusively because in that event it would tantamount to be falling in the hands of an*

erring Investigating Officer. As we do not find any reason to disbelieve the testimonies given by eyewitnesses of this case, we do not find any reason to take a contrary view and to interfere with the impugned judgment. These appeals, therefore, are dismissed."

25. It has been held in **Chhotu Vs. State of Maharashtra 1987 (4) SCC 533 & 1997 CRI.L.J 4394 (SC)** that:-

"That necessarily means that all of them were the most natural and probable witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be mentioned here that if the Investigating Officer failed to seize the bloodstained clothes of PWs 3 and 8 and to promptly examine PW3, whose names as any eye witness was disclosed immediately after the incident, it only indicates remissness on his part but the evidence of PW3 and 8 was not in any way impaired thereby."

26. It has been observed by the Hon'ble Supreme Court in **Dhanaj Singh @ Shera and others Vs. State of Punjab 2004 (3) SCC P-654** that in the instant case, the High Court found several disturbing features which indicated how the investigating Officer had made out a new case to save the accused persons and to implicate the complainant party. Hence, the High Court analyzed the evidence of the eyewitnesses with due care and caution. On finding the said evidence to be credible, the High Court upheld the conviction recorded by the trial court. Before the Hon'ble Supreme Court, the accused appellants challenged the conviction on the grounds (1) that the police after thorough investigation had concluded that it was the complainant party which caused the death of the deceased (ii) that the pellets, wads and cartridges were not recovered from the spot, (iii) that the weapons of assault and the pellets were not sent for ballistic examination, (iv) that the blood stained earth was not sent

for chemical examination (v) that many persons who could have thrown light on the incident had not been examined, and (vi) that the evidence being that of highly interested and inimical persons, should have been discarded. Dismissing the appeal, it was held by the Apex Court that even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to playing into the hands of the investigating officer if the investigation designedly defective. Thus, we do not find any force in the contention raised by the learned counsel for the appellants.

27. It was further contended that the accused/appellants belonged to different villages and they were not aware about the programme of the complainant party to go from their village to Roorkee on the date of the incident. It was further contended that Hanif PW1 had categorically stated that they planned to go to Roorkee in the morning itself to make the purchasings from there. When the accused/appellants were not aware in advance about the programme of the complainant party including the deceased Furkan to go to Roorkee, there was no occasion to accused/appellants to assemble at the place of occurrence. Learned G.A. refuted the contention. It is true that Hanif PW1 has stated that he had no plan to go to Roorkee before the morning on the date of occurrence. He finalized his plan to go to Roorkee for the purchasings in the morning itself. It is also pertinent to mention here that the scenario projected by the prosecution and the circumstances of the case lead to take an inference

that the accused/appellants had only plan to kill Furkan. There is no evidence that deceased Furkan had no plan to go to Roorkee on the date of the incident. Hanif PW1 has only stated that he has planned in the morning to go to Roorkee. Thus, it cannot be inferred from the evidence that the deceased had also made his plan in the morning itself to go to Roorkee. In absence of such positive evidence, it cannot be concluded that the deceased had no plan to go to Roorkee before the date of the incident. It is also pertinent to mention here that Hanif PW1 and Idrish PW2 had categorically stated in their evidence that the accused/appellants were hiding themselves in the crop of '*chari*' in the field of Mehmood nearby the path from where the deceased and the eyewitnesses had to go to Roorkee. It is also in the evidence that the path by which the deceased and his father and cousin were going was the shorter path to Roorkee. It is natural that a person would choose to go to Roorkee by a shorter way. The prosecution evidence also proves that the accused/appellants emerged from the field of '*chari*' and they caused fatal injuries on the person of the deceased. Thus, merely on the basis of the hypothesis or probability, the credible, cogent and convincing evidence cannot be discarded. Thus, we do not find any force in the contention raised by the learned counsel for the accused/appellants.

28. Learned counsel for the accused/appellants also doubted the truthfulness with regard to the place of occurrence. It was further contended that prosecution has led the evidence that three shots were fired, if it was so, some pellets would have been found at the place of occurrence. It is also the prosecution case that no pallets and empty cartridges were

found at the place of occurrence. It was further contended that the country made pistols supposed to have been used in the commission of offence were not recovered. Learned G.A. refuted the contention. Merely the fact that pellets were not recovered at the spot would not render the substantive evidence of eyewitnesses unreliable. Such evidence would only be a corroborative piece of evidence. It could only corroborate the ocular evidence. It has been held by the Apex Court in the case of **Birendra Rai and others Vs. State of Bihar reported in 2005 SCC (Cri.) 1455** in para 12 as under:-

> *"12…….If pellets were found at the place of occurrence it would have further strengthened the case of the prosecution, but in the absence of such evidence one has to rely upon the ocular evidence which if found reliable, may be acted upon. Unfortunately, in this case, despite the efforts of the prosecution the investigating officer could not be examined as a witness. The seizure witness has also been declared hostile. There is really no corroborative evidence, except the circumstantial evidence, to corroborate the version given by the witnesses. However, we find the eyewitnesses to be straightforward and reliable. Being rustic villagers there is no effort on their part to improve the case of the prosecution on the basis of imaginary facts. They have deposed in a straightforward manner, and there is a ring of truth in their testimony. We find them to be implicitly reliable."*

29. The Hon'ble Apex Court in the case of **Anwarul Haq Vs. State of U.P.** reported in 2005 SCC (Cri) 1629 held at para 15 as under :-

> *"15. Eyewitnesses in the present case have described the knife, and merely because the knife has not been recovered during investigation same cannot be a factor to discard the evidence of PWs 1 and 2. Wounds noticed by the doctor (PW3) also throw considerable light on this aspect. The doctor's opinion about the weapon, though theoretical, cannot be totally*

wiped out. In that view of the matter the appellant has been rightly convicted under Section 324 IPC."

30. The Hon'ble Apex Court in the case of **Munna alias Surendra Kumar Vs. State of M.P.** reported in 2004 SCC (Cri) 179 held at para 7 as under:-

"7. Before concluding, we must consider the argument of the learned counsel for the appellant that in the course of judgment of the trial court, it is noticed that an argument was addressed on behalf of the appellant that a 12-bore gun was recovered from the appellant which when sent to the ballistic expert, was found to have a defective firing pin but the barrel of the gun showed signs of discharge. Having perused the entire prosecution evidence, we find that though this fact was brought out in the course of arguments, the prosecution has nowhere based its case on this fact. It may or may not be true that such a gun was recovered but since the prosecution has not relied upon this piece of evidence, the fact that it was not properly recovered, would not make the prosecution case any weaker; at the most the piece of evidence would have to be rejected. Any argument that in the absence of the recovery of a gun from the appellant, there could be no conviction, will also have to be rejected. It may be possible that the learned counsel for the prosecution out of his overzealousness might have pointed to the trial court this fact which certainly is neither a legal evidence nor the basis of the prosecution case."

In absence of recovery of weapons, pellets and cartridges at the place of incident did not erode the credibility of cogent

and convincing evidence of the witnesses. These are the corroborative pieces of evidence and it would have only strengthened the prosecution case. In view of the above, we do not find any force in the contention raised by the learned counsel for the appellants.

31. Learned counsel for the accused/appellants further contended that the eyewitnesses have stated in their evidence that the accused/appellants emerging from the field of '*chari*' and surrounded the complainant party including Furkan and they shot dead Furkan on the path going through the field of Mehmood. It was further contended that the site plan prepared by the I.O. shows that the incident took place in the field of '*chari*'. It was further contended that there is variance with regard to place of occurrence in the site plan and in the ocular testimony. Learned G.A. refuted the contention. Hanif PW1 and Idrish PW2 had categorically stated that the accused/appellants shot fires upon the deceased on the path and he fell down on the path itself. As per the I.O., the place of occurrence has been shown about 7 paces from the path. It is not disputed that the path also goes through the field of Mehmood. It is also not disputed that the field and the path are of same level rather it is the case of both the parties that the path goes through the field of Mehmood where the incident took place. It is also in the evidence of the prosecution that the path is about 1 meter wide at some places and at some places it is 1 to 2 meters wide. It cannot be ruled out that the deceased would have been going on the path with his companions; he would have been going through one corner or the other of the path. If fire had been shot, naturally he would fell either on the side of the field or side of the road. The witnesses are rustic

villagers and they would say in common parlance that after the fires were shot on the deceased he fell down on the path. Generally a grown up man about 5 feet or more height naturally covers the place to the extent of his height on the way or path. It cannot be ruled out that his body would have fallen covering some portion of the '*chari*' field. It was submitted that Hanif PW1 had stated that '*ladies*' came at the place of incident and they wanted to see the face of deceased and Hanif PW1 showed them the face of the deceased. Learned counsel for the appellants assailed the evidence of Hanif PW1 that there was no occasion to Hanif PW1 to disturb the position of dead body at the place of occurrence. He further pointed out that he had been visiting the courts and he must have been aware that the dead body should not be touched in the homicidal death. Hanif PW1 is the father of the deceased. It is possible that he would have seen the body to know whether his son is still alive or not. Secondly, he is a rustic villager and it cannot be expected from him that if murder has been committed and the body was lying, it should not be touched. When the body was disturbed by Hanif PW1, the position of the body would have little been changed. Perusal of the site plan reveals that the place of incident had been shown in the field of '*chari*' adjacent to the path. The learned trial court was justified in holding that there is no variation at the place of occurrence between the oral evidence and the site plan prepared by the Investigating Officer. We are completely in agreement with the findings recorded by the learned Sessions Judge.

32. It was further contended that Autopsy Surgeon, Dr. Chandra Prakash PW4 who conducted the post mortem has found the stomach of the deceased empty at the time of

autopsy. Learned counsel for the accused/appellants further contended that Hanif PW1 had categorically stated in his evidence that the deceased had taken food before going to Roorkee. If he had taken food, he was murdered immediately after the departure from his village at about 10:30 a.m., his stomach would not have been found empty. The undigested and semi-digested food should have been found on his stomach. Learned G.A. refuted the contention. It is not in the evidence at what time the deceased had taken food. There is merely vague evidence that before going to Roorkee he had taken food. The deceased and his father are the farmers and they reside in the village. The timing of taking food differs from person to person. If they had taken food early in the morning before going to Roorkee, it would have been digested. In absence of positive evidence of the exact time of taking food by the deceased, only on the basis of the hypothesis, they would have taken food immediately before departure from the village would not make the credible, cogent and convincing evidence unbelievable. The medical evidence could not be made the sole criteria to determine the time of death on the basis of food found in the stomach of the deceased. In absence of such positive evidence, it cannot be concluded that there is variation in between the medical evidence and ocular evidence. The Hon'ble Apex Court in the case of **State of M.P. Vs. Dharkole alias Govind Singh and others** reported in **2005 SCC (Cri) 225** has held in para 8 and 9 as under:-

> *"8. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested*

independently and not treated as the "variable" keeping the medical evidence as the "constant".

9. It is trite that where the eyewitness' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the "credit" of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

Thus, we do not find any force in the contention raised by the learned counsel for the accused/appellants.

33. It was further contended that accused/appellant Israil has not used the country made pistol at the time of incident and he only remained standing there, as such, he should not be held guilty for the offence as charged against him. It was further contended that the accused/appellants have no common cause to commit the offence as charged against them. It was further contended that there was political rivalries in between the parties as such, the accused/appellants have been implicated in the case. Learned G.A. refuted the contention. On the date of the incident, the prosecution has led the evidence that all the accused were hiding themselves in the field and when they saw the deceased Furkan & others, they emerged and surrounded them. Thereafter, accused/appellant Iqbal told

Furkan that he had fired upon him few days back but he had made his escape good on that day and now he would not allow him to go scot-free and he would kill him. Thereupon, accused/appellant Abdul Akbar and Iqbal fired upon the deceased and the deceased died at the place of occurrence. The accused/appellants have made a vague statement that there was a political rivalry in between the parties. The details of the political / village rivalry had not been put forward by the defence. There is no effective cross examination on this point by the defence. Both the eyewitnesses Hanif PW1 and Idrish PW2 had stated in their evidence that all the four accused/appellants as well as accused Mehmoob and Mumtyaz were hiding themselves in the field of '*chari*' with the county made pistol and spear in their hands and they emerged with their weapons. Accused/appellants Akbar, Abdul and Iqbal fired upon the deceased. It is also in the evidence of the witnesses that Israil, Mehmoob and Mumtyaz surrounded Hanif PW1 and Idrish PW2 so that they could not save the deceased. Accused/appellant Israil has categorically been assigned the role of preventing the eyewitnesses Hanif PW1 and Idrish PW2 from intervening in the melee to save the life of deceased. Thus, it is evident that all the six accused including Mehmoob and Mumtyaz formed an unlawful assembly at the spot to cause the death of the deceased Furkan.

34. For the purpose of attracting section 149 IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose. In

the case of **Bishna Vs. State of W.B. 2006(1) SCC(Cri) 696** has held that :-

"63. **Mizaji v. State of U.P. 1959 Cri. L.J. 777** it was observed:

"Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all."

In ***Maslti V. State of U.P., AIR 1965 SC 202,*** *it was held:-*

"17……What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is

whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. ……."

35. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of the assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

36. The Hon'ble Supreme Court in **Bhajan Singh v. State of U.P. 1974 SCC (Cri) 604:-**

"13. Section 149 IPC constitutes, per se, a substantive offence although the punishment is under the section to which it is tagged being committed by the principal offender in the unlawful assembly, known or unknown. Even assuming that the unlawful assembly was formed originally only to beat, it is clearly established in the evidence that the said object is well knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused". The purpose

for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly.

37. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

38. The Hon'ble Supreme Court has observed in the case of **Masalti Supra,** which is as follows :-

> *"15. Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that the evidence should not have been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."*
>
> *16. ……..*
>
> *17. ……..Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that empathically brings out the principal that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. ……"*

39. The above decision was also followed in the decisions of the Hon'ble Apex Court in **Charan Singh & others Vs. State of U.P. 2004(4) SCC 205, Ram Dular Rai Vs. State of Bihar 2003(12) SCC 352 and Bishna Vs. State of W.B. 2006(1) SCC (Cri) 696.**

40. In the facts and circumstances of the present case, we can safely hold that the accused/appellants reached at the spot with common object to kill the deceased Furkan and they in furtherance of the said common object caused the grievous injuries on Furkan due to which he died. On a conspectus of various relevant features of the case including the genesis; the nature of the incident; the nature of the weapon carried by the accused at the scene of the occurrence, it cannot be concluded from the prosecution evidence or from any probability arising from the record that the accused/appellants had no common object to cause the death of the deceased. After going through the same, we do not find any reason to disbelieve the version of the prosecution witnesses. We are completely in agreement with the findings recorded by the trial court and we find that the prosecution has been able to establish the case beyond reasonable doubt. Thus, we do not find any force in the contention raised by the learned counsel for the appellants.

41. The accused/appellant Iqbal has stated in his statement recorded u/s 313 Cr.P.C. that on the date of incident he went to Mukurpur village as the wife of the his brother-in-law Wahid had expired. Thus, the accused/appellant Iqbal has taken a plea of alibi. It was obligatory on the part of accused/appellant Iqbal to produce the evidence to support the plea of alibi. The accused/appellant Iqbal had not

produced any evidence that on the date of incident he went to Mukurpur.

42. It is pertinent to mention here that during the pendency of the appeal, appellant No.1 Akbar s/o Majeet and appellant No.3 Abdul s/o Hasmat have died. The appeal so far as it relates to appellant No.1 Akbar and appellant No.3 Abdul stood abated vide Court's order dated 17.03.2004.

43. In view of the aforesaid reasons, we hold that the prosecution has established the guilt beyond reasonable doubt against the accused/appellants. We find that the learned trial court has rightly convicted and sentenced the accused/appellants and there is no infirmity in the impugned judgment and order passed by the learned trial court in Sessions Trial No. 515 of 1988. The accused-appellants are liable to be convicted and sentenced as awarded by the trial court. Hence, the appeal is liable to be dismissed and is hereby dismissed.

44. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months from the date of receipt of order.

(J.C.S. Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 25th September, 2007
Shiv